STATE OF SOUTH CAROLINA

BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NO. 2018-318-E

IN THE MATTER OF:	)	
	)	**SOUTH CAROLINA ENERGY USERS COMMITTEE BRIEF**
Application Duke Energy Progress, LLC For Adjustments in Electric Rate Schedules and Tariffs	)	

Duke Energy Progress, LLC seeks to increase its customers rates for unnecessary and imprudent costs. Duke Energy Progress, LLC should be granted recovery of only those costs necessary to benefit its ratepayers.

COAL ASH COST RECOVERY

Duke Energy Progress, LLC ("Duke Progress or DEP") seeks recovery of the cost to excavate a coal ash pond at its H.R. Robinson plant that was functioning as intended and was in compliance with all environmental regulations. In addition, Duke Progress seeks to impose inflated coal ash remediation costs imposed on the utility by the North Carolina General Assembly in response to a disastrous coal ash spill on the Dan River for which Duke Progress was convicted by the federal government. In both instances, Duke Progress seeks to impose costs on its ratepayers which provide them with no tangible benefit.

H.R. Robinson

Duke Progress' total cost to ratepayers for excavating its Robinson coal ash pond is expected to be $180 million, of which Duke Progress seeks to recover $11.5 million from

ratepayers in this docket (Wittliff direct p. 45 Table 5.4). These costs were not imposed on Duke Progress by South Carolina regulatory authorities. Rather, Duke Progress voluntarily undertook the costly excavation of the coal ash pond at its Robinson site and prevailed upon the South Carolina Division of Health and Environmental Control (DHEC) to enter an agreement to justify the recovery of the costs. See Consent Agreement 15-23-HW dated July 17, 2015. The Commission is being asked to surrender its rate making authority to DHEC which has no authority to set rates and which acts without regard to the interests of Duke Progress' ratepayers. The Commission must exercise its authority to protect Duke Progress' ratepayers from unnecessary and imprudent costs.

It is undisputed that the Robinson coal ash pond was not subject to regulation by either the Environmental Protection Agency's Coal Combustion Residual rule ("CCR") or the North Carolina Coal Ash Management Act or CAMA.

There would have been no reason to remediate the Robinson coal ash pond except that in its rush to put its environmental disaster on the Dan River behind it, Duke Progress solicited a consent agreement from an eager and compliant DHEC to allow Duke Progress to excavate its Robinson coal ash pond.

Consent Agreement 15-23-HW is peculiar. It is obvious from the consent agreement that Duke Progress was in compliance with its permit of the existing coal ash pond. The Findings of Fact in the consent agreement reveal no violation of DHEC regulations, State or Federal law. There is no record of seeps or spills. There is no record of surface water or ground water contamination. Consent Agreement 15-23-HW at p. 2. The Robinson coal ash pond received a clean bill of health.

These facts are corroborated by the testimony of Office of Regulatory Staff ("ORS") witness Willie J. Morgan. ORS witness Morgan testified that he was employed by DHEC for 19 years as Permitting Liaison where he assisted industries with environmental permitting requirements and his duties required knowledge of permitting information about solid and hazardous waste management. (Morgan prefiled direct at p. 1, 17 – p. 2, l. 1). ORS witness Morgan explained the regulatory process for the solid waste facility at Robinson. Mr. Morgan explained the structural fill inspection process in general and the June 9, 2015 inspection at Robinson in particular. As demonstrated by the DHEC Structural Fill Inspection Form (See Hearing Exhibit 70, a copy of which is attached), the Robinson coal ash pond in all respects met or exceeded DHEC regulatory requirements and was operated in a manner to protect groundwater and surface water quality. ORS witness Morgan explained that had the Robinson plant failed inspection resulting in a violation of its permit, DHEC had the authority to order Duke Progress to address the violation and to fine the utility for any violation (Tr. p. 1327, l. 18 – p. 1342, l. 4)

The consent agreement offers still more insight into the nature of the transaction between Duke Progress and DHEC. Because the Robinson coal ash pond was in compliance with DHEC regulations, DHEC had no authority or other leverage over Duke Progress to order Duke Progress to remediate the coal ash pond. To take advantage of Duke Progress' offer to excavate the coal ash pond, DHEC was forced to act by agreement, negotiated at arm's length. Consent Agreement 15-23-HW was therefore the result of a negotiated process whereby Duke Progress was able to force a concession from DHEC to agree to covenant not to sue Duke Progress. Consent Agreement 15-23-HW at p. 10. Had DHEC been acting pursuant to its

statutory authority to close the coal ash pond, a covenant not to sue would have been unnecessary. See S.C. Code Ann. § 44-96-450. S.C. Code Ann. § 44-96-450 provides:

> (A) Whenever the department finds that a person is in violation of a permit, regulation, standard, or requirement under this article, the department may issue an order requiring the person to comply with the permit, regulation, standard, or requirement, or the department may bring civil action for injunctive relief in the appropriate court, or the department may request that the Attorney General bring civil or criminal enforcement action under this section. The department also may impose reasonable civil penalties established by regulation, not to exceed ten thousand dollars for each day of violation, for violations of the provisions of this article, including any order, permit, regulation, or standard. After exhaustion of administrative remedies, a person against whom a civil penalty is invoked by the department may appeal the decision of the department or board to the court of common pleas. S.C. Code Ann. § 44-96-450(A)

Had Duke Progress failed to maintain and operate its Robinson coal ash pond in compliance with state and federal law, DHEC had the authority to impose civil and criminal penalties. Because the Robinson coal ash pond was in full compliance with the law, DHEC was essentially toothless in its authority to act.

In addition, because DHEC was not acting under its regulatory enforcement authority, DHEC was forced to negotiate to include language in the consent agreement granting it authority to inspect the remediation performed at the site. Consent Agreement 15-23-HW at p. 11. Had DHEC been acting pursuant to its regulatory enforcement authority, it would have been able to rely upon S.C. Code Ann. § 44-96-260 (4) for authority to compel entry upon the coal ash pond and inspect for compliance with State law.

DHEC was forced to rely upon common law contractual concepts to negotiate for the opportunity accomplish the goal of closing the coal ash pond. DHEC may have been acting in

its interests to agree to the terms of the consent agreement, but the agency was not acting in the interests of ratepayers.

Because DHEC is not required to consider the cost of its enforcement actions on the utility, Consent Agreement 15-23-HW is silent as to the financial impact on Duke Progress and its ratepayers. However, the Commission is charged with assessing the impact of a DHEC agreement on a utility's ratepayers and this Commission has exercised its authority to protect ratepayers from excessive measures imposed by DHEC by refusing to approve remedial action required by DHEC. See Commission Order No. 2004-203 in Docket No. 2003-218-S. Here, the existence of a DHEC consent agreement does not compel a decision by the Commission to force Duke Progress' ratepayers to pay for the unnecessary excavation of the Robinson coal ash pond.

The evidence reflects that Duke Progress rushed to judgment to eliminate the Robinson coal ash pond without regard to the need to remediate the pond and without regard to the cost to ratepayers. The only inference created by the record is that it was totally unnecessary to excavate the Robinson coal ash pond. In closing the Robinson coal ash pond, Duke Progress behaved imprudently. Forcing Duke Progress' ratepayers to pay $180 million for this unnecessary expense shocks the conscience. Duke Progress should be denied recovery of the cost of excavating the Robinson coal ash basin.

North Carolina CAMA

The excessive cost of Duke Progress' coal ash remediation will take a toll on its customers. Using a 20 MW manufacturing load with an 85% load factor, the cost to the DEP manufacturer would be $322,859 as opposed to the average cost in other southeastern states of $70,160.

(O'Donnell prefiled direct at p. 43, ll. 3-10).

Duke Progress' coal ash costs are excessive, due in part to the fact that it has been required by North Carolina legislation CAMA to excavate its coal ash ponds when compliance with the Environmental Protection Agency CCR's would have permitted Duke Progress to remediate its coal ash ponds more cheaply but as effectively. This Commission is under no obligation to enforce North Carolina legislation. CAMA was enacted in response to the disastrous Dan River spill. The North Carolina General Assembly determined that the electric utilities operating within its borders would be held to a higher standard than that set by the EPA in promulgating its CCR regulation. North Carolina residents should be made to pay the higher than necessary costs imposed on them by the North Carolina General Assembly. North Carolina ratepayers have a remedy at the North Carolina ballot box that South Carolina ratepayers do not have.

Allocation standards established by this Commission require that South Carolina residents be protected from the unnecessarily burdensome North Carolina Costs. This Commission's precedent in allocating the unnecessarily costly North Carolina renewable energy standards is controlling here. As ORS witness Seaman-Huynh explained, it is common practice for utilities operating in multiple jurisdictions to assign the costs related to certain accounts directly to one jurisdiction, especially if the costs are derived from laws and regulations that are specific to that jurisdiction. Examples include Act 236 Distributed Energy Resources (South Carolina) and the North Carolina Renewable Energy and Energy Efficiency Portfolio Standard Act ("REPS"). (Seaman-Huynh prefiled direct p. 6, ll. 7-20).

When normalized for the difference in coal ash generation across the country, DEC and DEP stand out as having two of the three highest coal ash AROs per kWh of generation. See Table 9 of O'Donnell's prefiled direct testimony at p. 42.

Table 9: Coal Ash ARO per KWH of Generation

Rank	Company	Calculated ARO per kWh of Generation
1	Duke Energy Progress, LLC	$ 0.002168
2	Mississippi Power Company	$ 0.001392
3	Duke Energy Carolinas, LLC	$ 0.000892
4	Georgia Power Company	$ 0.000860
5	Duke Energy Indiana, LLC	$ 0.000697
6	Virginia Electric and Power Company	$ 0.000551
7	Gulf Power Company	$ 0.000298
8	Arizona Public Service Company	$ 0.000290
9	Alabama Power Company	$ 0.000274
10	Kentucky Utilities Company	$ 0.000274
11	Kansas Gas and Electric Company	$ 0.000254
12	Public Service Company of New Mexico	$ 0.000147
13	Kansas City Power & Light Company	$ 0.000145
14	DTE Electric Company	$ 0.000123
15	Portland General Electric Company	$ 0.000123
16	Indiana Michigan Power Company	$ 0.000071
17	Duke Energy Florida, LLC	$ 0.000063
18	CLECO	$ 0.000057
19	Florida Power & Light Company	$ -
20	Entergy Arkansas, LLC	$ -

Duke Progress' coal ash liability was not unknown to the utility prior to the disastrous 2014 Dan River spill. ORS Witness Wittliff outlines the advance warning about the dangers

of coal ash ponds. (Wittliff prefiled direct p. 10, l. 1 – p. 15, l. 10). Duke Progress failed to heed these warnings and did nothing to begin address its coal ash liability. In the aftermath of the environmental disaster at its Dan River Plant in 2014, Duke Progress now asks its current and future customers to pay for expenses incurred to serve prior customers. To add insult to injury, Duke Progress is asking its South Carolina customers to pay for excessive and unnecessary costs required by the North Carolina General Assembly reacting to the Dan River catastrophe.

Stockholders need to be held accountable for the actions of Duke Progress executives that led to the Dan River spill that led, in turn, to the passage of CAMA. Given the fact that the DEP coal ash costs are so much higher than utilities operating in a similar manner, the Commission should disallow 75% of Duke Progress' coal ash request as recommended by SCEUC witness O'Donnell and put these costs to Duke Progress' stockholders.

REAL TIME PRICING

The Commission should require Duke Progress to offer its customers competitive hourly pricing rates. Duke Progress' hourly pricing should be set at the lower of the Company's marginal cost or the price as set by the open wholesale power market, as adjusted for transmission costs and line losses to move the power to the DEP service territory.

Duke Progress operates a closed system as it relates to its hourly prices to consumers. The price offered to consumers on an hourly basis is the DEP marginal cost for its generation. However, at the same time DEP is selling marginal cost power to its RTP customers, the utility is also operating in the competitive wholesale power market where opportunity purchases and sales are being made. Accordingly, there may be times when Duke Progress' marginal cost of

power offered to its manufacturing customers is greater than the price the Company could pay for that same power in the open wholesale market. Because Duke Progress prices its RTP rates at its own marginal costs, manufacturers are paying higher costs than necessary. Further, by failing to take advantage of lower cost power on the wholesale market, Duke Progress is also needlessly running its higher cost generating plants adding to higher fuel costs paid by all consumers. (O'Donnell prefiled direct at p. 44, l. 17 – p.45, l. 2).

The impact on Duke Progress' customers is significant. A manufacturer with a 20 MW load in Duke Progress' territory would have paid an additional [redacted][1] million for electricity, excluding transmission costs, than had the manufacturer purchased that same power from the Dominion Hub. (O'Donnell prefiled direct p. 46, ll. 5-12)

The General Assembly has vested its authority to regulate public utilities in the South Carolina Public Service Commission. S.C. Code Ann. § 58-3-140(A) reads as follows:

> (A) Except as otherwise provided in Chapter 9 of this title, the commission is vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State. S.C. Code Ann. § 58-3-140(A).

Duke Progress' high RTP costs should be designed to create a competitive manufacturing marketplace in South Carolina. SCEUC would urge the Commission to fix Duke Progress' RTP rates to compete with the market and to reduce the costs to manufacturers.

[1] Confidential

REMAINING ISSUES

With respect to the remaining issues to be addressed in this docket not hereinabove briefed and argued, SCEUC supports those positions of the ORS that do not conflict with SCEUC's positions set out above and those set out at trial.

CONCLUSION

The Dan River coal ash spill in North Carolina in 2014 set into motion a series of events that threaten to drive Duke Progress' rates for a generation. Reacting to public outcry over the Dan River spill, the North Carolina General Assembly passed an unnecessarily expensive measure intended to prevent future spills. Reacting to the excesses of the North Carolina General Assembly, the North Carolina Public Utilities Commission, authorized recovery of unnecessarily expensive coal ash remediation measures. Reacting to the excesses of the North Carolina General Assembly, the North Carolina Department of Environmental Quality, has now upped the stakes for Duke Progress' customers doubling the Duke system-wide estimated coal ash costs from $5.6 billion to $10 billion. Reacting to the excesses of the North Carolina General Assembly Duke Progress persuaded a willing DHEC to authorize the unnecessary remediation of the totally compliant Robinson coal ash pond at a cost of $180 million.

South Carolina ratepayers should not be held hostage to North Carolina politics. There is no reason why South Carolina ratepayers should pay more coal ash costs than necessary.

The Environmental Protection Agency, acting with more discipline and restraint, promulgated less costly regulations governing coal ash ponds. The EPA CCR rules adequately protect against mismanaged coal ash ponds. South Carolina ratepayers should pay no more than the EPA CCR rules require.

In addition, Duke Progress' decision to excavate the Robinson coal ash pond was not justified by the facts or the law. There was simply no reason to excavate the Robinson coal ash pond which was being properly managed and operated under DHEC's regulatory oversight. Forcing South Carolina ratepayers to pay for Duke Progress' recklessness is neither just nor reasonable.

For the reasons set out above, the Commission should act to protect Duke Progress' South Carolina ratepayers.

Scott Elliott
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201
Tel.: 803-771-0555
Fax: 803-771-8010

Attorney for South Carolina Energy Users Committee

Columbia, South Carolina

May 1, 2019

D H E C
PROMOTE PROTECT PROSPER

Structural Fill Inspection Form
Regulation 61-107.19, Part II

Facility Name: I-B Robinson SF — Date/Time of Inspection: 6/9/15 @ 1100
County: Darlington — Permit #: SF-00123
Reason for Inspection: X Routine; ____ Follow-up; ____ Complaint; ____ Other ____
Current Weather Conditions: Cloudy, 80°F
Previous 24-hours: Rain Y(N) – If yes, amount ____ inches; High winds Y(N)

1 – Meets or exceeds regulatory requirements; 2A – Improvement needed (minor issues exist; corrective measures recommended); 2B – Improvement needed (moderate issues exist; corrective action required and scheduled); 3 – Unacceptable (serious issues and/or recurring issues with minimal or no corrective action taken – alleged regulatory or permit condition violations have occurred – enforcement referral required); Y – Yes: Meets or exceeds regulatory requirements; N – No: Corrective measures recommended that should be fixed by the next inspection or an agreed upon completion date; NA – Not applicable; NI – Not inspected

Facility Entrance Area/Fill Area (Regulation 61-107.19, Part II E. 2-6)

1. (Y) N NA N — Attendant present
2. (Y) N NA NI — Fill area staked off
3. (Y) N NA NI — Working face efficiently and safely managed
4. (Y) N NA NI — Working face does not exceed 3:1 slope
5. Y N (NA) NI — Waste unloaded only in structural fill working face area
6. Y N (NA) NI — Unauthorized waste removed from the site within 48 hours
7. (Y) N NA NI — Waste reduced in size to less than 1 cubic yard in size

Monthly Cover (Regulation 61-107.19, Part II E.7)

8. (Y) N NI — Cover applied monthly with at least 6-inches of soils or other Department approved material
9. 1 — Condition of cover on inactive or closed areas

Environmental Protection (Regulation 61-107.19, Part II E. 8-9)

10. 1 — Control of dust, odors, litter, vectors, and fires/open burning
11. (Y) N NI — Site maintained/operated in a manner to protect groundwater and surface water quality

Closure of Entire Structural Fill Area (Regulation 61-107.19, Part II F.1.a)

12. 1 — Final two (2) foot soil cover in place
13. 1 — Top slopes at least 1% but not greater than 4%
14. 1 — Side slopes less than 33%
15. 1 — Vegetative cover at least 75% established with no substantial bare spots or construction underway

Name of those present during the inspection: Danelle Watson, Wylie Gilbert
Comments: Last date waste was added: Before 3/15, Final deed request submitted: Done

Inspection Item	Corrective action required	Date to be completed

Additional comment page: Y N — Photos taken: Y N

The signature below certifies that the SCDHEC inspector has personally checked each item and has answered according to the true condition existing at the time of inspection.

Wylie S. Gilbert
Facility Representative

Danelle Watson
SCDHEC Inspector

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